if the appellant started to encroach on his side of the road if he was no more than 3-4 feet from the edge of the road which was only 18 feet 8 inches wide. We are of the view that the respondent did attempt to overtake. He had first seen the car coming from the opposite direction about 150 feet away (His pillion first saw the car in front 100 feet away) and there was no other vehicle in front. He nevertheless tried to overtake and a little too late he appreciated he could not quite make it. The appellant had not anticipated that the respondent would persist in his attempt to overtake and could not take evasive action. He could perhaps have braked or slowed down a little, in the event the respondent was fool-hardy enough to continue.

We therefore disagreed, with respect, with the learned judge in holding the appellant wholly to blame and that the respondent was not guilty of contributory negligence as he was only trying to overtake a lorry but had not in fact at the time of collision overtaken the lorry yet and was still on his side of the road. He would then have been likely thrown on to the lorry. He must certainly have been very near the centre, if not on the other side.

We found in the circumstances that the respondent and the appellant were equally to be blamed. We therefore varied the judgment of the High Court to one of 50-50 per cent liability. As ground 7 was abandoned at the outset, we ordered that half the sum awarded be paid to the respondent. We made no order as to costs of this appeal. The deposit was to be refunded to the appellant.

Appeal allowed.

Solicitors: *Jayaraman, Ong & Co.; Triptipal Singh & Co.*

GOVERNMENT OF MALAYSIA v. SIM SIOK ENG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 9 and March 3, 1978]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 69 and 73 of 1976]

Practice and Procedure — Appeal to Yang di-Pertuan Agong — Leave granted subject to conditions — Application for extension of time to prepare record of appeal and to pay deposit for costs — No reasons given for delay in paying deposit — Whether Government bound — Federal Court (Appeals from the Federal Court) (Transitional) Rules, 1963, r. 7 — Government Proceedings Ordinance, 1956, ss. 18 and 30.

The appellant had been granted leave to appeal to the Yang di-Pertuan Agong subject to the two usual conditions: (i) that a deposit for costs be paid within three months and (ii) that the appellant prepare the record of appeal within three months. Appellant applied for time to be enlarged for them to comply with the two conditions. The deposit was paid 17 days late. It was argued that the provisions of Rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules do not apply to the Government.

Held: (1) to justify an extension of time there must be material upon which the court could exercise its discretion, for otherwise a party in breach could have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation;

(2) in this case the condition in respect of deposit had not been complied with within the stipulated time and as the statutory condition had not been fulfilled the court had no power to grant an extension of time;

(3) the Government as a party was not exempted from Rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules.

Cases referred to:-

(1) *Ohene Moore* v. *Akesseh Tayee* [1935] A.C. 72.

(2) *Chong Thian Yin & Ors.* v. *The Trustees of the Estate of Cheang Kok Sang & Anor.* [1954] M.L.J. 37.

(3) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153.

(4) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

(5) *Kerridge* v. *Lamdin* [1950] 1 K.B. 478, 484.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for the appellant.

V.K. Palasuntharam for the respondent.

Wan Suleiman F.J.: The judgment of the court which I am about to read has been written by the Chief Justice, Borneo.

Lee Hun Hoe C.J. (Borneo) (read by Wan Suleiman F.J.): On September 5, 1977 appellant was granted conditional leave to appeal to His Majesty the Yang di-Pertuan Agong against the order of this court dated July 14, 1977 on the two usual conditions: —

(1) That appellant do within three months enter into good and sufficient security in the sum of $5,000 for the due prosecution of the appeal and the payment of all such costs as may become payable;

(2) That appellant do within the period of three months procure the preparation of the record of appeal.

By a motion dated December 10, 1977, appellant applied for an order that the time for complying with the two above conditions be enlarged for a further two months from December 5, 1977. An affidavit was filed in support of the application. Paragraph 3 of the affidavit sets out the reason for the application and reads: —

"The record of appeal involves several bulky exhibits which have to be sorted out and photostated. It will take time to prepare the record of appeal which will be very voluminous. In view of the foregoing, the time of three months granted by this Honourable Court is inadequate to complete the preparation of the record of appeal."

Respondent took objection to the application on the ground that the deposit was paid on December 22, 1977, i.e. 17 days late. Appellant conceded the late payment. But no reason was given in the affidavit for this late payment.

Rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules 1963 states: —

"7. Leave to appeal to the Yang di-Pertuan Agong in a civil matter shall only be granted by the court in the first instance —

(a) upon condition of the appellant, within a period to be fixed by the court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the court, in a sum not exceeding $5,000 for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the respon-

dent in the event of the appellant not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Yang di-Pertuan Agong ordering the appellant to pay the respondent's costs of the appeal, as the case may be; and

(b) upon such other conditions, if any, as to the time or times within which the appellant shall take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England as the court, having regard to all the circumstances of the case, may think it reasonable to impose."

It is the contention of appellant that the provisions of rule 7 do not apply to appellant as the Government. Reference was made to sections 18 and 30 of the Government Proceedings Ordinance, 1956 which read: —

"18. Subject to the provisions of this Ordinance, the provisions of the written law relating to procedure shall apply to civil proceedings by or against the Government in the same way as to suits between subject and subject.

30. Subject to the provisions of this Ordinance, all ordinances, enactments and rules of court relating to appeals and stay of execution shall, with any necessary modifications, apply to civil proceedings by or against the Government as they apply to proceedings between subjects."

Appellant's submission is that these should be read subject to modification that the Government be exempted from paying a deposit as Government is always sure to pay costs if so ordered. Senior Federal Counsel appearing for appellant pointed out that as a matter of practice Government had always paid the deposit. As to the printing of the record this will take time. The Government Printer could not do it because of other commitments so it would have to be done by a private printer. Further, it was submitted that the application should be granted on the ground of the merits of the appeal.

Respondent raised two objections to the application. First, there is no power to extend time under rule 7. Secondly, there is no material to justify the extension of time. The affidavit says nothing about the delay of payment of deposit so that there is nothing on which the court could act. As to preparation of the record, the respondent took less than three months to prepare the record. The question is not that no harm has been caused by the delay, but a matter of principle is involved.

Section 39 of The Interpretation and General Clauses Ordinance, 1948 which is still applicable to the present case reads: —

"Where in any written law a time is prescribed for doing any act or taking any proceeding and power is given to a court or other authority to extend such time, unless the contrary intention appears the power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed."

The rights to appeal are statutory creations. As such the question of inherent jurisdiction does not come in. In *Ohene Moore* v. *Akesseh Tayee*[1] the Privy Council held that an appellate court could not waive compliance with statutory requirements. That was a case of an appeal from the Native Tribunal. Under section 77(2) of the Native Administration Ordinance of the Gold Coast Colony which is in substance similar to rule 7(a) it is provided: —

"Leave to appeal from the Paramount Chief's Tribunal shall not be granted unless and until the appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in this court to which the appeal is being taken a sum of money sufficient to satisfy such costs: and such court shall not grant a stay of execution with respect to the said costs."

In delivering the judgment of the Board, Lord Atkin said at page 74: —

"It is sufficient to say that the statutory condition upon which alone leave to appeal could be given was not fulfilled. When the appeal came before the Provincial Commissioner this point was taken, and he perhaps not unnaturally treated it as a technicality which he could sweep aside, and ordered that the costs incurred by the respondent, £21. 2s. 6d., in the court of first instance should be at once paid to this court, and that was eventually done. He then proceeded to allow the appeal. Unfortunately, as was found by the majority of the Court of Appeal and as their Lordships think, the Provincial Commissioner had no jurisdiction to make any order at all, because no appeal was properly before him. After all, it is to be remembered that all appeals in this country and elsewhere exist merely by statute, and unless the statutory conditions are fulfilled no jurisdiction is given to any court of justice to entertain them."

Having stated that their Lordships did not agree with the reasoning of Howes J. in dissenting in the Court of Appeal, Lord Atkin said: —

"It is quite true that their Lordships, as every other court, attempt to do substantial justice and to avoid technicalities; but their Lordships, like any other court, are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other court to have jurisdiction."

Reference was made to *Chong Thian Yin & Ors.* v. *The Trustees of the Estate of Cheang Kok Sang & Anor.*[2] to support the proposition that there is no power to extend time. In that case by rule 5(3) of the Titles to Land (Occupation Period) Appeal Rules, 1950, "the appellant shall at the time of filing the record serve one copy thereof on the Commissioner and one copy on each of the interested parties." The appellants filed the record of appeal on December 10, 1952 and served a copy of the record on the respondents on July 27, 1953. Thomson J. as he then was, held that the court has no power to extend the time mentioned in rule 5(3); and that the provision in rule 5(3) with respect to the term of delivery was obligatory and that is, that it amounted to a condition precedent and as it had not been complied with the appeals had in effect become a nullity.

That case refers to a particular rule and is concerned with service. In *Tan Ting Kok* v. *Cheong Lep Keen & Anor.*[3] where the notice was served on respondents out of time this court, in rejecting an application for extension of time to serve notice, held that the appeal was therefore not properly before the court and could not be proceeded with. If the appellant has complied with the conditions but finds that he really has not sufficient time to prepare the record, there is no reason why he cannot, before the expiry of the time, apply for extension of time. As long as there is merit the court will probably exercise its discretion. By rule 8 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules, 1963 the preparation of the record is under the supervision of the court which shall give such directions as the justice of the case may require. But, it was held by the Privy Council in *Ratnam* v. *Cumarasamy & Anor.*[4] that to justify an extension of time for filing of the

record there must be material upon which the court could exercise its discretion, for otherwise a party in breach could have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a timetable for the conduct of litigation.

However, the point before this court is that the condition in respect of deposit has not been complied with within the stipulated time. In our view, if the statutory condition has not been fulfilled the court has no power to grant an extension of time. Appellant has not convinced us that the Government is exempted from rule 7. In fact, the Government has always complied with rule 7. Under rule 7(a) the maximum period for providing security is three months and the court has no power to extend time. The observations of Jenkins C.J. in *Kerridge* v. *Lamdin*[5] apply aptly to this situation: —

"One reaches a conclusion of this kind with some regret, for it is never very satisfactory that a possibly meritorious claim should be excluded merely because the claimant has inadvertently allowed time to expire; but, where a statute confers a right and stipulates that it must be exercised within a prescribed period, that period must be observed; and, in the absence of any provision in the Act allowing the time limit to be relaxed, failure to observe the prescribed period must inevitably be fatal to the claim."

We would therefore refuse this application with costs.

Application refused.

Solicitors: *Ee & Lim.*

GOVERNMENT OF STATE OF PAHANG v. TENGKU ABDUL AZIZ & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Chang Min Tat F.JJ.) November 15, 1977 and March 4, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 112 of 1977]

Practice and Procedure — Application for leave to amend statement of defence — Dismissed by judge in chambers — Counsel applying in open court to appeal against decision in chambers — Hearing of action stayed — R.S.C. 1957, O.54 r.22A and O.70 r.1 — Courts of Judicature Act, 1964, s.68(2).

This was an appeal for the dismissal of an application for leave to amend the Statement of Defence by pleading section 9(1) of the Limitation Act 1953 as a bar to the claim of the respondents as their action was commenced after the expiration of twelve years from the date on which the right of action accrued. The application had been made in Chambers and had been dismissed but subsequently the appellant's counsel said in open court that he wished to appeal against the decision in Chambers and asked that the hearing of the action be stayed. At the hearing of the appeal counsel for the respondents raised the preliminary objection that Order 54 rule 22A and section 68(2) of the Courts of Judicature Act, 1964 have not been complied with.

Held: (1) the appellant should be given leave to amend. No party had been taken by surprise or prejudiced by reason of the application. The application did not deny the respondent's right to pursue the action. Dismissal however would deny the appellant a defence which was clearly open to them;

(2) justice would not be served by acceding to the objections on technicalities for non-compliance with Order 54 rule 22A. The proceedings could be validated under the recent amendment to Order 70 rule 1 of the Rules of the Supreme Court.

Case referred to:-

(1) *T.O. Thomas* v. *K.C.I. Reddy & Anor.* [1974] 2 M.L.J. 87, 92.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for the appellant.

H.L. Tennakoon for the respondents.

Ong Hock Sim F.J. (delivering the judgment of the Court): This is an appeal from the dismissal of an application for leave to amend the statement of defence by pleading section 9(1) of the Limitation Ordinance 1953 as a bar to the claim of the respondents as their action was commenced after the expiration of twelve years from the date on which the right of action accrued.

It is the claim of the respondents that by a document made in A.H. 1304 (1884 A.D.), the then Sultan of Pahang made a gift of certain lands being the basin of the Sungei Rompin and its tributaries from their sources to their mouths to the ancestors of the respondents. It is not necessary in this appeal to refer to the reliefs claimed. The only issue is whether the amendment should have been refused.

On April 27, 1977, the day fixed for hearing of Civil Suit No. 9 of 1974, the Legal Adviser, Pahang applied to amend the statement of defence, in terms of a Summons-in-Chambers filed on April 23, 1977. Page 18 indicated this was taken up in Open Court on April 27, 1977 and adjourned to the following day, April 28. The note at page 19 seemed to show that the application was referred back to the Judge in Chambers, when arguments were heard and then deferred to the following day for decision. On April 28, the brief note recorded that the application was dealt with in Chambers and dismissed. That same day, page 21 of the Record, noted that in Open Court, with both counsel present, the appellant's counsel said he wished to *appeal against the decision in Chambers* and "asks that the hearing of the action be stayed until the disposal of the appeal." His application for stay was supported by counsel for the respondents. The learned judge in his judgment observed that the necessity for the amendment should have been abundantly clear to any ordinary practitioner from the moment the action was filed and overlooking sections 38 and 39, matters "essentially within the working knowledge of the ordinary practitioner" was inexcusable. By such conduct and laches, he deemed the appellant had acquiesced in the action and waived the privilege to plead the statute and is now estopped from invoking the plea. We regret that both counsel failed to draw the attention of the learned judge to Order 54 rule 22A and to act in accordance therewith. It is obvious there has been indifference on all sides to the Rules of the Supreme Court. Counsel for the respondent now seeks to take advantage of this non-observance, for which, in our view, he must accept some responsibility when he agreed to a stay of the action. We incline to the view that justice would not be served by acceding to objections on technicalities for non-compliance with Order 54 rule 22A. We agree with learned counsel for the appellants that the recent amendment to Order 70 rule 1 would validate